KOAY HEAN KHOON v. ABDUL JAMIL ABDUL MUTALIB & ANOR

HIGH COURT MALAYA, PULAU PINANG
S NANTHA BALAN JC
[CIVIL SUIT NO: 22NCVC-496-2011]
15 MAY 2014

CIVIL PROCEDURE: *Assessment of damages – Application for directions – Delay – Extension of time to apply for directions – Whether delay of 27 months amounted to inordinate delay – Whether defendant's contumelious or reprehensible conduct was a ground to grant extension of time – Whether extension of time to be granted – Rules of Court 2012, O. 37 r. 1*

CIVIL PROCEDURE: *Time – Extension of – Application for extension of time to apply for directions for assessment of damages – Whether delay of 27 months amounted to inordinate delay – Whether defendant's contumelious or reprehensible conduct was a ground to grant extension of time – Whether extension of time to be granted – Rules of Court 2012, O. 3 & O. 37 r. 1*

The plaintiff, pursuant to O. 3 of the Rules of Court 2012 ('ROC'), applied for an extension of time to apply for directions in relation to the hearing of assessment of damages as ordered pursuant to the High Court Order dated 19 December 2011 ('the HC Order'). The HC Order had granted the plaintiff specific performance against the defendants in relation to a contract for the sale of a plot of land. Within seven days of the HC order, the defendants had to execute a memorandum of transfer and facilitate the withdrawal of the caveats placed upon the land by the defendants. The HC Order further provided for damages in addition to or *in lieu* of specific performance. The plaintiff claimed that the defendants wilfully and deliberately refused to comply with the terms of the HC Order. The defendants had also filed fresh caveats in defiance of the HC Order; lodged police reports causing the police to intervene and obstructed and denied the plaintiff from the benefit of the HC Order; caused threats and harassment of the plaintiff; physically intruded the land to prevent the plaintiff from carrying on any form of work on the land; and filed a multitude of frivolous court applications and appeals. The HC Order was made on 19 December 2011, whereas the instant application was filed on 18 February 2014. In the intervening period, other than making a request by letter to the Registrar to fix an appointment date for assessment of damages, nothing was done by the plaintiff pursuant to the Rules of the High Court 1980 ('RHC 1980') or under the ROC, to initiate the process of assessment of damages. The letter that was written by the plaintiff's solicitors yielded no result as the defendants objected to the plaintiff taking such a route. Hence, the plaintiff finally invoked the procedural provisions under O. 37 r. 1 of the ROC to apply to the Registrar for directions. This step which had to be taken within one month from the date of the HC Order, was only taken after a delay of 27 months. The plaintiff contended that by reason of

the extraneous circumstances occasioned by the defendants' wrongdoings which continued after the grant of the HC Order, the plaintiff continued to suffer loss and damage after the grant of the HC Order and such loss and damage suffered by the plaintiff could not be assessed with certainty until late 2013 after the defendants' wrongdoings had abated. The plaintiff also claimed that the one month period to apply to the Registrar for directions under the ROC is a new requirement which did not exist prior to 1 August 2012 under the RHC 1980. Further, the one month period to apply to the Registrar for directions had already expired at the time when the ROC came into effect since the HC Order was made eight months prior to the introduction of the ROC. As such, it was submitted that it would be unjust that the plaintiff should be denied the right to assess damages due to the introduction of the prescribed time through the newly introduced ROC. Hence, the plaintiff claimed that time should be extended so as to comply with O. 37 r. 1(1) ROC.

Held (dismissing plaintiff's application with costs):

(1) When the ROC came into force, the time period of one month had already expired. However, plaintiff ought to have filed an application as soon as possible after the coming into force of the ROC. But the plaintiff took no steps to apply immediately after 1 August 2012. Instead, the plaintiff waited until 18 February 2014 to apply for extension of time for assessment of damages to be carried out. (para 71)

(2) Even assuming that the plaintiff's complaints as regards the defendants' conduct in relation to disobedience of the HC Order were well founded, that, in and of itself, was of no assistance to the plaintiff in the context of the present application. Everything stemmed or emanated from the plaintiff's stance that he was entitled to damages subsequent to the date of the HC Order. Even if it could be proven that there was damage and those damages were caused by the defendants' impugned conduct, there was nothing in the HC Order which supported the plaintiff's stance that he was entitled to any damages after the date of the HC Order arising out of such conduct on the part of the defendant. The plaintiff was only entitled to damages suffered or incurred up to the date of the HC Order. The events complained of by the plaintiff, which occurred after the date of the HC Order, gave rise to separate causes of action and for which the plaintiff was entitled to pursue separate legal actions. (paras 73, 74, 75 & 78)

(3) The land was already transferred to the plaintiff. The defendants had not been paid the balance of purchase price because the plaintiff had taken no steps to have his damages assessed. (para 83)

(4) There had been an inordinate delay on the part of the plaintiff and it would be unjust and oppressive to extend time to enable the plaintiff to assess damages after a lapse of 18 months and 18 days since the ROC

came into force and 26 months since the date of the HC Order was made. Regardless of how blatant or contumelious or reprehensible the conduct of the defendants was, there were no valid grounds for exercising the discretion to extend time in favour of the plaintiff. (paras 84 & 85)

Case(s) referred to:

Cergas Tegas Sdn Bhd (In Liquidation) v. SAP Holdings Bhd & Anor [2013] 8 CLJ 745 CA ***(refd)***

Courts Mammoth Bhd v. Subramaniam Paramasivam [2007] 3 CLJ 59 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 7 CLJ 457 CA ***(refd)***

National Union of Bank Employees v. Director General of Trade Union & Anor [2013] 7 CLJ 957 FC ***(refd)***

R v. Bloomsbury and Marylebone County Court ex parte Villerwest Ltd [1976] 1 All ER 897 ***(refd)***

Legislation referred to:

National Land Code, s. 327

Rules of Court 2012, O. 1A, O. 2 r. 3, O. 3 r. 5(1), O. 37 rr. 1(1), (3), 6

Rules of the High Court 1980, O. 37 r. 1(1), O. 92 r. 4

For the plaintiff - Lim Hock Siang; M/s Presgrave & Matthews
For the defendant - K Kumarathiraviam; M/s Lee Hean Cheng & Co

Reported by Amutha Suppayah

JUDGMENT

S Nantha Balan JC:

Introduction

[1] This is my judgment in respect of an application by the plaintiff (encl. 49) pursuant to O. 3 r. 5 Rules of Court 2012 (hereinafter referred to as "the ROC") for extension of time to apply for directions in relation to the hearing of assessment of damages as ordered pursuant to the High Court Order dated 19 December 2011 (hereinafter referred to as "the HC Order").

The HC Order

[2] The High Court Order reads as follows:

(1) Satu perintah pelaksanaan spesifik perjanjian Defendan-defendan untuk menjual kepada Plaintif sekeping tanah yang dikenali sebagai Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang ("Hartanah tersebut") yang dipegang di bawah Geran No 21596 bersama-sama dengan premis-premis yang mempunyai alamat tafsiran No. 25, 25A dan 23B, Jalan Padang Tembak, Air Itam, 11500 Pulau Pinang berdasarkan syarat-syarat seperti yang dinyatakan dalam Perjanjian Jual Beli yang bertarikh 18/12/2007 dan Perjanjian Tambahan bertarikh 21/3/2011.

(2) Satu Perintah bahawa:

(a) Defendan Pertama dalam tempoh 7 hari dari tarikh Perintah atau suatu masa lain sebagaimana yang ditetapkan oleh Mahkamah yang Mulia ini melaksanakan dan menyerahkan kepada Plaintif atau Peguamcara Plaintif satu Memorandum Pindah Milik yang sah dan boleh didaftarkan dalam Borang 14A Kanun Tanah Negara 1965 untuk memindah milik 3/20 bahagian yang tidak berbelah bahagi dalam Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 dan dipegang oleh Mohd Zulkifli bin Mohd Zaid kepada Defendan Pertama yang telah disempurnakan oleh Mohd Zaid bin Mansor sebagai penjaga *ad litem* untuk Mohd Zulkifli bin Mohd Zaid; dan

(b) dalam keingkaran perenggan 27.2 (a), satu perintah bahawa 3/20 bahagian yang tidak berbelah bahagi yang dipegang oleh Mohd Zulkifli bin Mohd Zaid dalam Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 diletakhakkan atas nama Plaintif dengan serta-merta.

(3) Satu Perintah bahawa:

(a) Defendan Pertama dalam tempoh 7 hari dari tarikh Perintah atau suatu masa lain sebagaimana yang ditetapkan oleh Mahkamah yang mulia ini:

(i) melaksanakan dan menyerahkan kepada Plaintif atau Peguamcara Plaintif Penarikan Balik Kaveat Persendirian Perserahan No.0799B2008016739 yang dimasukkan oleh Defendan Pertama dalam Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 yang sah dan boleh didaftarkan, bersama-sama dengan semua dokumen yang berkaitan termasuk salinan Kad Pengenalan Defendan Pertama yang diperakui benar dan yuran pendaftaran bagi tujuan pendaftaran penarikan balik kaveat tersebut; dan

(ii) menyerahkan kepada Peguam Plaintif satu salinan kad pengenalan Mohd Ghouse bin Mohamad Shah yang diperakui benar dan yuran pendaftaran bagi tujuan mencatatkan penarikan balik Kaveat Persendirian yang dimasuk oleh Mohd Ghouse Mohamad Shah bin di Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596.

(b) dalam keingkaran perengan 27.3 (a)(i), satu perintah bahawa Kaveat Persendirian Perserahan No. 799B2008016739 yang dimasuk oleh Defendan di Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 dibatalkan dengan serta-merta; dan

(c) dalam keingkaran perengan 27.3 (a)(ii), satu perintah bahawa Kaveat Persendirian Perserahan No. 0799B2007016912 yang dimasuk oleh Mohd Ghouse Mohamed Shah bin dalam Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 dibatalkan dengan serta-merta.

(4) Satu Perintah bahawa sekiranya berlaku keingkaran oleh Defendan-defendan untuk melaksanakan perkara-perkara yang diperintahkan oleh Mahkamah yang Mulia ini, Defendan-defendan akan bertanggungjawab atas proses pelaksanaan bagi tujuan memaksa Defendan-defendan untuk mematuhi perintah sama.

(5) Satu perintah bahawa Pendaftar Hakmilik Pulau Pinang atau Pentadbir Tanah Daerah Timur Laut, Pulau Pinang, memberi kesan sepenuhnya kepada perintah yang dibuat oleh Mahkamah yang mulia ini dengan:

(a) membatalkan Kaveat Persendirian Perserahan No. 0799B2008016739 yang dimasuk oleh Defendan Pertama dalam Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 dengan serta-merta;

(b) membatalkan Kaveat Persendirian Perserahan No. 0799B2007016912 yang dimasuk oleh Mohd Ghouse Mohamed Shah Bin dalam Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 dengan serta-merta; dan

(c) meletakhakkan 3/20 bahagian yang tidak berbelah bahagi yang dipegang oleh Mohd Zulkifli bin Mohd Zaid dalam Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 atas nama Plaintif dengan serta-merta.

(6) Satu perintah menghalang Defendan-defendan dan/atau ejen atau pengkhidmat mereka daripada berurusan dalam apa cara, melesapkan atau melupuskan Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No 21596 Harta berkenaan kepada mana-mana orang lain selain daripada Plaintif atau membeban harta tersebut dalam apa-apa cara sekalipun.

(7) Ganti rugi sebagai tambahan kepada atau sebagai ganti pelaksanaan spesifik terhadap Defendan-defendan untuk ditaksirkan; [emphasis is ours]

(8) Faedah pada kadar 8% setahun ke atas jumlah apa-apa ganti rugi am yang ditaksirkan dan dikira dari tarikh pemfailan tindakan ini sehingga tarikh pembayaran penuh oleh Defendan-defendan;

(9) Satu perintah bahawa Plaintif adalah bebas untuk menggunakan baki harga belian untuk membayar/menyelesaikan semua kos yang ditanggung oleh Plaintif dan untuk menolak atau memotong yang

sama terhadap ganti rugi am dan kos sebagaimana yang diperintahkan oleh Mahkamah ini yang perlu dibayar oleh Defendan-defendan kepada Plaintif sebelum membayar baki harga pembelian kepada Defendan-defendan;

(10) Kos sebanyak RM7,000.00 dibayar oleh Defendan-defendan kepada Plaintif. (See: Exhibit "A-1" Encl. 50)

Conduct Of The Defendants Subsequent To The HC Order

[3] According to the plaintiff, the defendants wilfully and deliberately refused to comply with the terms of the HC Order. To this end, reference was made to a letter dated 3 January 2012 sent by the plaintiff's solicitors to the former solicitors of the defendants, Messrs Sunny Khoo & Co in respect of the defendants' refusal to comply with the terms of the HC Order particularly cls. (2), (3), (6) and (10). Apparently the defendants did not reply to the assertions made in this letter nor took any steps to comply with the terms of the HC Order.
(See: exh. "A2" encl. 50)

[4] The plaintiff maintains that due to the conduct of the defendant subsequent to the HC Order he was compelled to do the following:

(a) On 5 January 2012, arising from the refusal of the defendants to comply with para. (3)(a) of the HC Order to withdraw the private caveats entered by the first defendant and Mohd Ghouse bin Mohamed Shah on the land, the plaintiff had to resort to paras. (3)(b) and (c) and (5) of the HC Order to apply to the land office to remove the caveats.

(b) On 16 February 2012, arising from the refusal of the defendants to comply with para. 2(a) of the HC Order to deliver the duly executed instrument of transfer, the plaintiff had to resort to paras. (2)(b) and (5)(c) of the HC Order to vest the 3/20 undivided share of Lot No 8, Seksyen 5, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang held by Mohd Zulkifli bin Mohd Zaid to the plaintiff.

[5] On 6 January 2012, the defendants filed a notice of appeal to the Court of Appeal against the HC Order which was registered as Civil Appeal No: P-02[IM][NCVC]-219-01/2011 (hereinafter referred to as "the defendants' appeal").

[6] On 10 January 2012, after the plaintiff removed the caveat, the first defendant filed a fresh Private Caveat No. 0799B2012000286 on the land. The plaintiff complains that this was done in disregard of para. (6) of the HC Order and in order to frustrate the plaintiff from dealing with the land. (see: exh. "A3" encl. 50).

[7] On 16 January 2012, the defendants filed a notice of application dated 16 January 2012 (encl. 28) for a stay of execution and/or enforcement of the HC Order pending the disposal of the defendants' appeal.
(see: exh. "A4" encl. 50).

[8] According to the plaintiff, prior to the hearing of encl. 28 on 28 February 2012, the defendants went on "a rampage" of filing a series of police reports, threats and measures to frustrate and stifle the plaintiff from enjoying the benefit of the HC Order. The plaintiff maintains that the police reports were all false. A

[9] Arising from false police reports made by the first defendant, on 18 January 2012, the plaintiff was ordered by the police not to carry out any work on the land. In the premises, the plaintiff instructed his solicitors, Messrs R Nethaji Rayer & Co to write to the Penang State Police Commissioner on 1 February 2012 (See: exh. "A5" encl. 50) objecting to the police action in preventing the plaintiff from exercising his rights over the land which had been determined under the HC Order. B C

[10] On 1 February 2012, during the case management before the learned High Court Judge wherein the first defendant appeared in person, the learned High Court Judge had informed both parties that the first defendant had written a complaint letter against the learned High Court Judge to the Chief Judge of Malaya pertaining to the HC Order. As such, on 1 February 2012 the plaintiff's solicitors wrote to the defendants' former solicitors, Messrs N Ahilan & Associates in relation to the first defendant's letter of complaint against the learned High Court Judge which was not copied to the plaintiff's solicitors. Nevertheless, the defendants' solicitors did not reply. (see: exh. "A6" encl. 50). D E

[11] Also, the plaintiff maintains that the first defendant had written to the learned High Court Judge on 7 February 2012 stating that the matter had not yet been determined by the court and that he had lodged police reports claiming that the plaintiff had trespassed on the land and that criminal proceedings had been brought against the plaintiff as a result thereof. The plaintiff therefore says that quite apart from the fact that the first defendant had acted in defiance of the HC Order and was in contempt of court, the first defendant had admitted to the fact that he had used under hand tactics to frustrate the plaintiff from enjoying the benefit of the HC Order. (see: exh. "A7" encl. 50). F G

[12] In this respect, reference was made to para. 15 of the defendants' affidavit in reply where it was stated that the police report dated 8 February 2012 was filed in order to maintain the *"status quo"* pending the disposal of the defendants' appeal to the Court of Appeal against the HC Order. H

[13] The plaintiff's solicitors had by way of letter dated 16 February 2012 to the defendants' solicitors objected to the defendants' conduct as aforesaid actions which (according to the plaintiff) amounted to contempt of court.

[14] However, this apparently did not stop the defendants from continuing with further wrongful acts to obstruct and prevent the plaintiff from enjoying the benefit of the HC Order. (see: exh. "A8" encl. 50). I

[15] On 23 February 2012, the defendants filed an *ex parte* notice of application dated 23 February 2012 (encl. 34) for an injunction to prevent the plaintiff and/or his employees from entering the land or dealing with the land pending the disposal of the defendants' appeal.
(see: exh. "A9" encl. 50).

[16] On 27 February 2012, the first defendant filed a second fresh Private Caveat No. 0799B2012002348 on the land which the plaintiff says is in defiance of the HC Order. (see: exh. "A3" encl. 50).

[17] On 6 March 2012, the plaintiff's solicitors gave notice to the defendants' solicitors to withdraw the said private caveat as it was in breach of the HC Order. But, the defendants refused to do so.
(see: exh. "A10" encl. 50).

[18] Then, it is alleged that on 7 March 2012, the first defendant had wrongfully entered the land wherein he had threatened the plaintiff and caused havoc at the site so as to prevent the plaintiff's workers from carrying out site clearance. The plaintiff had made a police report on 7 March 2012 and his solicitors, Messrs R Nethaji Rayer & Co wrote to the State Police Commissioner on 23 March 2012 for action to be taken against the first defendant. (see: exh. "A11" encl. 50).

[19] On 12 March 2012, the defendants' application for an *ex parte* injunction pursuant to encl. 34 was dismissed by the High Court with costs of RM1,500. However, the plaintiff maintains that the defendants have yet to pay the said cost to the plaintiff. (see: exh. "A12" encl. 50).

[20] On 26 March 2012, the defendants' application for stay pending appeal pursuant to encl. 28 was dismissed by the High Court with costs of RM4,000. These costs too have yet to be paid to the plaintiff. (see: exh. "A13" encl. 50).

[21] On 12 April 2012, the Court of Appeal dismissed the defendants' appeal with costs of RM5,000. Again, these costs have not been paid to the plaintiff. (see: exh. "A14" encl. 50).

[22] On 17 April 2012, the plaintiff's solicitors issued a notice to the first defendant in respect of the private caveat entered by the first defendant. The plaintiff maintained that the entry of the caveat was in defiance of the HC Order. However the first defendant refused to withdraw the said private caveat. (see: exh. "A15" encl. 50).

[23] On 9 May 2012, the defendants filed an application for leave to appeal against the decision of the Court of Appeal of 12 April 2012 which was registered as Federal Court Civil Application No: 08(i)-387-05/2012(P). (see: exh. "A16" encl. 50).

[24] On 1 June 2012, the plaintiff through his solicitors Messrs R Nethaji Rayer & Co gave notice to the first defendant to withdraw the caveats which were entered by the first defendant and to cease and desist from harassing, threatening and disturbing the plaintiff. However the plaintiff claims that the first defendant disregarded the said notice. (see: exh. "A17" encl. 50).

[25] On 26 July 2012, the defendants withdrew the application for leave to appeal to the Federal Court of Malaysia. (see exh. "A18" encl. 50).

[26] Apart from the above proceedings, the defendants had filed Civil Suit No.: 22NCVC-499-2011 ("Suit 499") against the plaintiff involving the same subject matter. As both proceedings involved the same parties and the same subject matter, both civil suits were heard together and the parties had agreed that the court's decision shall be binding on the parties in both proceedings.

[27] As such, arising from the HC Order and by consent of parties, Suit 499 was also dismissed on 19 December 2011 with costs of RM2,000 awarded to the plaintiff. Again, the cost awarded to the plaintiff has not been paid. (see: exh. "A19" encl. 50).

[28] On 19 January 2012, the defendants filed a summons-in-chambers dated 19 January 2012 (encl. 15) to set aside the HC Order. On 13 April 2012, the High Court dismissed encl. 15 with costs of RM1,500. (see: exh. "A20" encl. 50).

[29] On 25 April 2012, the defendants filed the notice of appeal to the Court of Appeal against the High Court decision of 13 April 2012 which was registered as Civil Appeal No.: P-02[NCVC][W]-999-05/2012 ("the second appeal"). On 13 June 2012, the defendants withdrew the second appeal. (see: exh. "A21" encl. 50).

[30] On 20 June 2012, the plaintiff applied to the land office to remove Private Caveat No. 0799B2012008834 which was entered by the first defendant. However, the land office had only removed the said private caveat on 1 October 2012.

[31] In the result, the plaintiff maintains that the defendants had resorted to various under-handed tactics to obstruct and deny the plaintiff of the benefit of the HC Order.

[32] The defendants' impugned conduct can be summarised as follows:

(a) refusal to comply with the terms of the HC Order;

(b) filing of fresh caveats in defiance of the HC Order;

(c) lodging of false police reports and instigating the police to wrongfully intervene, obstruct and deny the plaintiff from the benefit of the HC Order;

(d) threats and harassment of the plaintiff;

(e) physical intrusion on the land to prevent the plaintiff from carrying on any form of work on the land; and

(f) filing of a multitude of frivolous court applications and appeals.

The Present Application (encl. 49)

[33] To recapitulate, the HC Order was made on 19 December 2011, whereas the instant application was filed on 18 February 2014. In the intervening period, other than making a request by letter to the Registrar to fix an appointment date for assessment of damages, nothing was done by the plaintiff pursuant to the Rules of the High Court 1980 or under the ROC, to initiate the process of assessment of damages. The letter that was written by the plaintiff's solicitors yielded no result as the defendants objected to the plaintiff taking such a route.

[34] Hence, the plaintiff was compelled to invoke the requisite procedural provisions under the ROC. The relevant provision under the ROC being, O. 37 r. 1 ROC, stipulates that the plaintiff as the party entitled to a judgment for damages has to apply to the Registrar for directions and this has to be done within one month from the date of the judgment.

[35] Order 37 r. 1 of the ROC (which came into effect on 1 August 2012) reads as follows:

> (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.
>
> (3) If the party entitled to the benefit of the judgment fails to comply with paragraph (1), the Court may, on the application of the party against whom the judgment is given, proceed to assess damages or make such other order as it thinks just.

[36] It was submitted for the plaintiff that the one month period to apply to the Registrar for directions under the Rules is a new requirement which did not exist prior to 1 August 2012 under the Rules of the High Court 1980. However, the one month period to apply to the Registrar for directions had already expired at the time when the ROC came into effect since the HC Order was made eight months prior to the introduction of the ROC.

[37] As such, it was submitted that it would be draconian and unjust that the plaintiff should be denied the right to assess damages due to the introduction of the prescribed time through the newly introduced ROC. Hence, the plaintiff says that time should be extended so as to comply with O. 37 r. 1(1) ROC.

[38] In this context, plaintiff's counsel urged that I should have regard to O. 1A ROC which reads as: A

> O. 1A – Court or Judge Shall Have Regard to Justice
>
> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein. B

[39] Then, counsel also referred to O. 2 r. 3 of the ROC which provides as follows:

> A Court of Judge shall not allow a preliminary objection by any party to any cause or matter or proceedings only on the ground of non compliance C of any provision of these Rules unless the Court or Judge is of the opinion that such non compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured by amendment or an appropriate order for costs or both.

[40] Finally, counsel for the plaintiff referred to O. 3 r. 5(1) of the ROC D which provides as follows:

> The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.

[41] Since, this was essentially an application by the plaintiff for extension E of time, counsel sought to rely on the judgment of the Chief Justice, Tun Arifin Zakaria speaking for Federal Court in *National Union of Bank Employees v. Director General of Trade Unions & Anor* [2013] 7 CLJ 957; [2013] 6 MLJ 167 where he emphasised that the court must have regard to justice in line with O. 1A of the ROC in the exercise of discretion to extend time. F

[42] Counsel referred to the following passage from the decision of the Federal Court:

> [23] On the first question the learned High Court judge correctly stated that even though there is no "in built" provision to extend time, the extension of time is provided under O. 3 r. 5 of the RHC which is the G general provision which confers upon the court the discretion to extend time.
>
> [24] We think it is pertinent to consider the nature of the non-compliance and whether the non-compliance had seriously prejudiced the respondents' case. This is because the effect of a non-compliance may H vary from case to case.
>
> [27] The grant of extension of time by the court is one of discretion by virtue of O. 3 r. 5 of the RHC. The principle to be applied by the court is settled. In *Saed U Khan v. Lee Kok Hooi* [2001] 5 MLJ 416, it was held that, the court should consider certain factors, when exercising its I discretion to extend time, namely: (1) the delay in making an application; (2) whether or not there are cogent reasons for the litigant not to have

made the application within the prescribed time; and (3) the likelihood and degree of prejudice, as well as injustice to the opposite party should the court exercise its discretion….In exercising its discretion, the court must have regard to justice. This is in line with the provision in O1A of the RHC (see *Maxwell v. Keun* [1928] 1 KB 645; *Walker v. Walker* [1967] 1 WLR 327).

[43] The above principle was also stated by Abdul Malik Ishak JCA speaking for the Court of Appeal in *Cergas Tegas Sdn Bhd (In Liquidation) v. SAP Holdings Bhd & Anor* [2013] 8 CLJ 745, where he said:

[32] The Court will have regard by virtue of O. 1A of the RHC and O. 2 r. 3 of the RHC to the justice of the particular case and to determine judicially whether the non-compliance with the rules had occasioned a substantial miscarriage of justice.

[36] Low Hop Bing J (later JCA) in *Public Bank Bhd v. Lee Kin Mio & Anor* [2006] 1 CLJ 630; [2006] 3 MLJ 47 rightly held that under O. 2 r. 3 of the RHC, a court or judge shall not allow any preliminary objection by any party to any cause, matter, or proceedings any on the ground of non-compliance with any of the provisions of the RHC unless the court or judge is of the opinion that such non-compliance had occasioned a substantial miscarriage of justice.

[39] It must be emphasised that in *Sin Hai Estate Berhad & 3 Ors v. Lim Jit Kim @ Lim Tian Jee & 19 Ors (supra)*, the High Court Judge considered that the plaintiff's delay of almost three months in filing an affidavit in response to the defendant's application to set aside the suit did not constitute a substantial miscarriage of justice. Here, there was a delay of seven days in filing the record of appeal. In our judgment, where the technicalities raised are strictly confined to non-compliance, disregarding and ignoring those technicalities would not occasion any miscarriage of justice.

[44] Also, counsel referred to *Courts Mammoth Bhd v. Subramaniam a/l Paramasivam* [2007] 3 CLJ 59; [2007] 4 MLJ 544, where Abdul Malik Ishak J (as he then was) allowed the application for extension of time and held as follows:

[19] It was rightly pointed out that the plaintiff would suffer grave injustice if the plaintiff's application for extension of time was not allowed by this court bearing in mind that the defendant's purported accounts were not in compliance with the order of this court dated 8 July 2004 … In *The Tokai Maru* [1998] 3 SLR 105, p 113, the Singapore's Court of Appeal quoted favourably the following speech of Sir Thomas Bingham MR in *Costellow v. Somerset County Council*:

The approach to application under O. 3 r. 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a

> procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under O. 3 r. 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.

[20] The Defendant too has not shown that the present case herein was a special case or there were any exceptional circumstances to refuse the plaintiff's application in encl 17. In *The Bonito; Owners of the Ship or Vessel 'Bonito' v. Owners of the Ships or Vessels 'Ah Lam II' And 'PU 1804'* [2001] 3 SLR 32, p 39, the Singapore's Court of Appeal had this to say:

> 18. In exercising his discretion the judge took into consideration the relevant matters. One of the matters he considered most carefully was the likelihood of prejudice to the appellants. He found that no prejudice would be caused to the appellants by granting the extension of time. He said at pp 23-25:
>
> > 23 Having regard to all the circumstances I am satisfied that an extension of time as asked for by the plaintiffs will not cause any prejudice to the defendants for which they cannot be compensated by an award of costs. An extension of time in favour of one party in a sense causes an injustice to the other just as the refusal to grant an extension of time causes an injustice to the party out of time but here I think the balance of justice favours the making of an order to extend time. It remains to consider whether this is a special case or if there are any exceptional circumstances to refuse the extension of time asked for.

[45] Counsel for the plaintiff also relied on the court's power under its inherent jurisdiction to do justice or to prevent an injustice. For this counsel referred to *R v. Bloomsbury and Marylebone County Court ex parte Villerwest Ltd* [1976] 1 All ER 897; [1976] 1 WLR 362 (CA) where, it was held:

> The county court had a wide inherent jurisdiction to control its own procedure. That included the power to enlarge or extend any time limits attaching to an order granted at an earlier hearing by a different judge. The court's powers were not limited to what was expressly stated in the rules of practice and applied even where the application for an extension of time was made after the relevant period had elapsed.

[46] In this context, counsel said that it was appropriate that the inherent jurisdiction as expressed in O. 92 r. 4 of the ROC be utilised to extend time. Order 92 r. 4 of RHC reads as follows:

> 4 Inherent powers of the Court (O. 92 r. 4)
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of process of the Court.

[47] In conclusion, counsel relied on *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 7 CLJ 457; [2004] 1 MLJ 271 where Mohamed Apandi JC (as he then was) referred to the inherent jurisdiction under O. 92 r. 4 and expressed the view that the court ought not to be bound and tied by rules which are after all general rules of procedure if to do so would cause injustice. This is how he put it:

> [23] The scope of this provision is very wide. It is a procedural rule and is not intended to alter substantive rights. The key words in the rule are: "… to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court."
>
> [35] See case of *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 1 MLJ 561, where the court held that in the interest of justice, an application should not be struck out on procedural defect. In *UMBC v. Ernest Cheong Yong Yin*, Ahmad Fairuz JCA (as he then was) quoted with approval what was said in *Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 at p 189:
>
> > The rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice. In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
> >
> > But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
> >
> > This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles* and *Ravenshear*:
> >
> > > Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; *and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.* (emphasis added.)

[48] In the circumstances, counsel said that based on the above principles and for the reasons as alluded to in the affidavits and submissions, there are cogent reasons for the plaintiff not to have applied for directions within the prescribed time under O. 37 r. 1 of the ROC and that are justifiable grounds in the interest of justice for the grant of extension of time as prayed for in the application.

[49] Counsel for the plaintiff emphasised that by reason of the extraneous circumstances occasioned by the defendants' wrongdoings which continued after the grant of the HC Order, the plaintiff continued to suffer loss and

damage after the grant of the HC Order and such loss and damage suffered by the plaintiff could not be assessed with certainty until late 2013 after the defendants' wrongdoings had abated due to the following reasons:

(a) The plaintiff was unable to deal with the land at the time when the HC Order was granted as the defendants had not only defied the HC Order to remove the pre-existing caveats but had filed fresh caveats thereafter.

(b) Furthermore, the defendants took extraordinary measures to obstruct the plaintiff from carrying out site clearance and the construction of a housing project on the land by wrongful threats, intrusions, disturbances and filing of false police reports to instigate police intervention in this matter.

(c) In the result, the commencement of the construction of the housing project on the land had been delayed until 2013 and the project has not been completed when this application was made in February 2014 and none of the units has been sold yet.

(d) As such, there has been no intentional and wilful disregard of the ROC on the part of the plaintiff.

[50] In conclusion, counsel for the plaintiff said that:

(a) The grant of the extension of time will not prejudice the defendants as they will have the chance to be heard during the hearing of assessment of damages;

(b) There is no substantial miscarriage of justice, no exceptional circumstances and no special case shown by the defendants to deny the plaintiff of the extension of time applied for herein; and

(c) If there is any truth in the defendants' contention that the delay in the application for directions had prejudiced them, it is incomprehensible why the defendants did not at any material time apply under O. 37 r. 1(3) of the ROC to apply for directions to assess the damages or such other orders which they were at liberty to do.

Submissions For The Defendants

[51] Counsel for the defendants submitted that as the HC Order does not contain any provision as to how the damages to be assessed, thus damages have to be assessed by the Registrar. As such, it is a requirement under O. 37 r. 1(1) ROC that the plaintiff who is entitled to the benefit of the HC Order shall, within one month from the date of the HC Order which was on 19 December 2011, to apply to the Registrar for directions towards assessment.

[52] Counsel says that the plaintiff had failed to comply with the requirement of the said O. 37 r. 1(1) ROC, and when the plaintiff filed this application for extension of time on 18 February 2014, there was a delay of 27 months from the date of the HC Order and as such, the delay is an inordinate one which certainly requires plausible and/or acceptable explanation by the plaintiff.

[53] According to the defendants, there is no basis for any extension of time for assessment of damages to be undertaken. In this regard, counsel emphasised that the HC Order provides as follows:

(i) Ganti rugi sebagai tambahan kepada atau sebagai ganti perlaksanaan spesifik terhadap Defendan-Defendan untuk ditaksirkan;

(ii) Faedah pada kadar 8% setahun ke atas jumlah apa-apa ganti rugi am yang ditaksirkan dan dikira dari tarikh pemfailan tindakan ini sehingga tarikh pembayaran penuh oleh Defendan-Defendan;

(iii) satu perintah bahawa, Plaintif adalah bebas untuk menggunakan baki harga belian untuk membayar/menyelesaikan semua kos yang ditanggung oleh Plaintif dan untuk menolak atau memotong yang sama terhadap ganti-rugi am dan kos sebagaimana yang diperintahkan oleh Mahkamah ini yang perlu dibayar oleh Defendan-Defendan kepada Plaintif sebelum membayar baki harga pembelian kepada Defendan-Defendan; dan

(iv) kos sebanyak RM7,000.00 dibayar oleh Defendan-Defendan kepada Plaintif.

[54] The defendants say that although under the HC Order the plaintiff was entitled to have his damages assessed and thereafter to have the assessed damages and costs ordered in the HC Order deducted from the outstanding balance purchase price of the land of RM237,642.90, the plaintiff had deliberately failed, refused and/or defaulted to initiate assessment proceedings.

[55] According to the defendants this was done for the following reasons:

(i) to attain a more lucrative interest at the rate of 8% per annum on the damages to be assessed as the HC Order provides for the said interest to be computed from the date of filing of this suit until full settlement; and

(ii) to avoid paying the balance purchase price of RM237,642.90 or any part of it still owing to the defendants.

[56] Counsel submitted that by disregarding the time limit provided under the ROC to assess the damages, the plaintiff had evinced that he had no intention and/or took no steps towards assessing his damages (if there was any) pursuant to the HC Order.

[57] Also, it was pointed out that it was only when the defendants issued a notice to the plaintiff's solicitors demanding the said balance purchase price, that the plaintiff for the first time replied by stating that the said balance purchase price is not payable until his damages are assessed. A

[58] According to the defendants, the reply by the plaintiff, came as no surprise as the intention of the plaintiff all along, in not assessing his damages though he was entitled to, was to deprive the defendants of their said balance purchase price. (see: exh. "AJM1" encl. 52.) B

[59] Counsel for the defendants had suggested that on realising the delay and the increased pressure from the defendants, the plaintiff had attempted to get around the requirement of O. 37 r. 1(1) ROC by directly writing to the Registrar on 5 February 2014 and applying for an appointment for assessment of damages whilst ignoring the delay. However, it was only when the said irregular application/request was objected to by the defendants, that the plaintiff subsequently filed this application for extension of time on 18 February 2014. (see: exh. "AJM3" encl. 52). C D

[60] As for the complaints made by the plaintiff concerning the defendants' conduct in entering fresh caveats and filing police reports, counsel says that the defendants have vigorously denied that the police reports were false or that they were not entitled to file fresh caveats. As for trespass/nuisance, the defendants say that the plaintiff had in fact filed a suit, namely Penang High Court Suit 22NCVC-806/2011, which was subsequently withdrawn on 27 January 2014. E

[61] The defendants' response on the plaintiff's contention of assessment any alleged continuing damages beyond 19 December 2011, is misconceived both in law and fact and that the plaintiff's rights to assess his damages is derived from the HC Order. Thus, the plaintiff is only entitled to damages (if there was any) until 19 December 2011 by virtue of the HC Order. F

[62] In this regard, it submitted that the plaintiff's initial cause of action through this suit was for an order of specific performance against the defendants which was allowed under the HC Order and the entire land was duly transferred and registered in the plaintiff's name as early as 16 February 2012. Hence, the plaintiff has successfully reaped the fruit of his litigation. Thereafter, there could be no more damages of any kind based on the same cause of action. To allow any further damages to the plaintiff subsequent to the HC Order will only unjustly enrich him. G H

[63] Counsel pointed out that though the plaintiff claims that the defendants are in contempt of the HC Order, no committal action was ever initiated by the plaintiff against the defendants for the alleged contempt.
(see: to exh. "AJM6" defendants' encl. 52). I

[64] The defendants' maintain that plaintiff's allegation that, due to the defendants' conduct he was forbidden from dealing and thereafter developing the land is false. The defendants say that even before the HC Order was made, the plaintiff had started developing the land which was effectively carried out during and after the HC Order. Hence, the building of one bungalow unit and two semi-detached terrace units had already been completed on the said land.
(see: exh. "AJM5" encl. 52).

[65] Also, the defendants say that, for the purpose of developing the land and thereafter to facilitate its sale, the plaintiff had as early as 13 March 2013 effectively sub-divided the land into three different lots. As such, the defendants ask rhetorically: how could this be done if the plaintiff had been prevented from dealing with the land?
(see: exh. "AJM8" encl. 52)

[66] In conclusion, it was submitted for the defendants that if this application is dismissed, then this court should order that the plaintiff do immediately pay the defendants the sum of RM230,642.90 being the balance purchase price after deducting a sum of RM7,000 being costs ordered in the plaintiff's favour as per the HC Order. In this regard, reference was made to refer O. 37 r. 1(3), ROC.

Findings And Conclusions

[67] The essence of the plaintiff's position is that by reason of the extraneous circumstances occasioned by the defendants' alleged wrongdoings which continued after the grant of the HC Order, the plaintiff continued to suffer loss and damage and such loss and damage suffered by the plaintiff could not be assessed with certainty until late 2013 after the defendants' wrongdoings had abated.

[68] In amplification, the plaintiff has said that:

(a) He was unable to deal with the land at the time when the HC Order was granted as the defendants had not only defied the HC Order to remove the pre-existing caveats but had filed fresh caveats thereafter;

(b) Furthermore, the defendants took extraordinary measures to obstruct the plaintiff from carrying out site clearance and the construction of a housing project on the land by wrongful threats, intrusions, disturbances and filing of false police reports to instigate police intervention in this matter;

(c) In the result, the commencement of the construction of the housing project on the land had been delayed until 2013 and the project has not been completed when this application was made in February 2014 and none of the units has been sold yet; and

(d) As such, the plaintiff claims that has been no intentional and wilful disregard of the ROC on the part of the plaintiff.

[69] As for delay, the following should be noted. The HC Order is dated 19 December 2011 whereas the instant application was filed on 18 February 2014. The ROC came into force on 1 August 2012. The application for extension of time was filed 18 months and 18 days since the ROC came into force. Also, it was filed 26 months since the HC Order was made. No doubt, under O. 37 r. 1(1) Rules of the High Court 1980, time was at large for assessment of damages.

[70] But all that changed with the coming into force of the ROC and the party entitled to the benefit of an order for damages to be assessed must apply to the Registrar within one month of the grant of the order for damages for directions for an assessment of damages to be carried out.

[71] Since the instant application is predicated under O. 3 of the ROC, it implies that the plaintiff considers himself bound by the ROC. Of course, it is correct that when the ROC came into force, the time period of one month had already expired. However, plaintiff ought to have filed an application as soon as possible after the coming into force of the ROC. But the plaintiff took no steps to apply immediately after 1 August 2012. Instead the plaintiff waited until 18 February 2014 to apply for extension of time for assessment of damages to be carried out.

[72] The plaintiff may well be right as to existence of the various events referred to in his affidavits as regards the defendants' conduct in relation to disobedience of the HC Order etc, but I make no conclusion one way or the other as to the motives that are being imputed by the plaintiff to the defendants' impugned conduct.

[73] Even assuming that the plaintiffs' complaints in this regard are well founded, I am of the view that in and of itself is of no assistance to the plaintiff in the context of the present application. In my view, everything stems or emanates from the plaintiff's stance that he is entitled to damages subsequent to the date of the HC Order and this is bolstered by the allegation that, "the plaintiff continued to suffer loss and damage after the grant of the HC Order and such loss and damage suffered by the plaintiff could not be assessed with certainty until late 2013."

[74] But it is necessary and imperative to ask: where does it say in the HC Order that the plaintiff is entitled to damages for events precipitated by the defendants which occurred or took place after the date of the HC Order? Even if it can be proven that there was damage and those damages were caused by the defendants' impugned conduct, I see nothing in the HC Order which supports the plaintiff's stance that he is entitled to any damages after the date of the HC Order arising out of such conduct on the part of the defendants.

[75] In my view, the plaintiff is only entitled to damages suffered or incurred up to the date of the HC Order. If the plaintiff's interpretation is to be followed, then the HC Order has to be regarded or construed as an "evergreen order" which covers all types of damages which occurred after the date of the HC Order.

[76] For my part, I see nothing in the language of the HC Order which supports the plaintiff's interpretation as regards the ability of the HC Order to entitle the plaintiff to damages (if any) occurring after the date of the HC Order.

[77] In my view, the plaintiff's argument, if it is taken to its logical conclusion, is akin to saying that the damages occurring after the date of the HC Order based on a "continuing cause of action" (see: O. 37 r. 6 ROC). But the instant suit was based on a cause of action for breach of contract and specific performance and this cannot, by any stretch of imagination or interpretation, be construed as a continuing cause of action.

[78] In my view, each of the events complained of by the plaintiff, which occurred after the date of the HC Order give rise to separate causes of action and for which the plaintiff was/is entitled to pursue subsequently by way of separate legal actions.

[79] To take an example, the plaintiff complained of the actions by the defendants in filing new caveats. These caveats can be removed under s. 327 of the National Land Code and upon removal, damages for wrongful entry of caveat will become payable. But this is a separate matter and has nothing to do with assessment of damages under the HC Order. Likewise, the issue of trespass and false police reports etc are actionable by way of separate legal proceedings and are not and cannot be tied up with the assessment of damages under the HC Order. In fact, a separate suit for trespass/nuisance was in fact filed by the plaintiff by way of Penang High Court Suit No. 22NCVC-806/2011 which was withdrawn on 27 January 2014.

[80] In the upshot, I am impelled to the view, that the factors relied upon by the plaintiff in the affidavits and submissions are not relevant and germane to the HC Order and there was, at all material times, no legal or other impediment to the plaintiff applying to the Registrar to fix a date and give directions for assessment of damages.

[81] Also, to say that the defendants could have applied for assessment of damages is neither here nor there. What is undeniable is the fact that because damages were not assessed, the plaintiff could just fold his hands and say that he need not pay the defendants the balance of purchase price of RM230,642.90.

[82] Bearing in mind that the HC Order does not entitle the defendants to any interest on the balance of purchase price, the delay in the assessment of damages would only mean that the defendants have been deprived of the ability to use the monies until the present moment.

[83] On the other hand, the land has already been transferred to the plaintiff. If this is not prejudice to the defendants then I don't know what is. In the result, the defendants has not to-date been paid the balance of purchase price and this is because the plaintiff has taken no steps to have his damages assessed.

[84] In all the circumstances, I am of the view that notwithstanding the multitude reasons that have been relied upon and the occurrence of various events post the date of the HC Order, there has been inordinate delay on the part of the plaintiff and it would be unjust and oppressive to extend time to enable the plaintiff to assess damages after a lapse of 18 months and 18 days since ROC came into force and 26 months since the date of the HC Order was made.

[85] Regardless of how blatant or contumelious or reprehensible the conduct of the defendants was, I am of the view that there are no valid grounds for exercising the discretion to extend time in favour of the plaintiff.

The Outcome/The Order

[86] The plaintiff's application is hereby dismissed with costs of RM7,500 to be paid by the plaintiff to the defendants.

[87] As for the suggestion by counsel for the defendants, that I should order the plaintiff to pay the balance of purchase price less the costs of RM7,000, I am of the view that that should be the subject of a separate application as the plaintiff objects to that being made part of the present application.

Order accordingly.